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No. 95-1925

Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1995

OXFORD HOUSE-C., an unincorporated association; OXFORD HOUSE, INC., a Delaware not-for-profit corporation; OXFORD HOUSE-W., an unincorporated association; MISSOURI DEPARTMENT OF MENTAL HEALTH, DIVISION OF ALCOHOL & DRUG ABUSE,

Petitioners,

VS.

CITY OF ST. LOUIS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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ADDITIONAL QUESTION PRESENTED FOR REVIEW

Whether a municipality seeking to protect single-family neighborhoods may limit the number of individuals with disabilities who may live together in a group home?

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REASONS FOR GRANTING THE WRIT

The petition for a writ of certiorari was filed in this case on May 23, 1996. At the time, petitioners argued that the Eighth Circuit had failed to analyze the City's eight-handicapped-person rule under the established framework for facially discriminatory policies. *See* Petition for Writ of Certiorari at 15. Since the petition was filed, a conflict has developed among the circuits regarding the standard for defendant's burden of justification in cases of facial discrimination under the Fair Housing Act as amended, 42 U.S.C. §§3601 *et seq.*

In the decision below, the Eighth Circuit held that a "rational basis" was sufficient to justify the City of St. Louis' zoning policy which, on its face, was directed exclusively at individuals with disabilities. *See* Appendix to Petition for Writ of Certiorari at pp. A-4—A-5 ("App."). On July 16, 1996, the Sixth Circuit in *Larkin v. State of Michigan Department of Social Services*, 89 F.3d 285, 290 (6th Cir. 1996), cited the Eighth Circuit's decision in this case and expressly rejected the rational basis test that it had employed. Instead of adopting that minimal standard, the Sixth Circuit held that, under the Fair Housing Act, a disability-specific policy must be warranted by the unique, specific needs and abilities of those handicapped persons to whom it would be applied. The Sixth and Eighth Circuit standards also differ from the rule set out by the Tenth Circuit in *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1503-04 (10th Cir. 1995).

The Sixth, Eighth, and Tenth Circuit opinions present a conflict regarding the burden that defendant must meet to justify an explicitly disability-based policy under the Fair Housing Act.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS REQUIRING DEFENDANT TO ESTABLISH A STATUTORY AFFIRMATIVE DEFENSE IN ORDER TO JUSTIFY A FACIALLY DISCRIMINATORY POLICY

In cases involving Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, and the Age Discrimination in Employment Act, 29 U.S.C. §§621 *et seq.* (ADEA), this Court has held that a facially discriminatory must be justified by one of the affirmative defenses established by the statute in question. In *International Union, UAW v. Johnson Controls, Inc.*, __ U.S. __, 111 S.Ct. 1196 (1991), the Court found that the business necessity test used in Title VII disparate impact cases was inapposite because the fetal protection policy at issue discriminated on its face. Since the policy was gender-specific, it was sex discrimination forbidden under Title VII unless defendant could establish one of the statute's affirmative defenses. *Id.* at 1204. *See also City of Los Angeles, Dept. of Water v. Manhart*, 435 U.S. 702, 716-17 (1978); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971).

Similarly, in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), the framework used by the Court to analyze an age-specific policy under the ADEA required defendants to prove one of the Act's five affirmative defenses. As with the disparate impact test urged in *Johnson Controls*, the Court found the disparate treatment formula of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), to be inapplicable to an explicitly age-based policy. The discrimination is proved by the express terms of the policy, not by evidence of its effect or its malevolent or benign motivation. Having been proved, that discrimination may be excused only by a defense permitted by Congress.

This Court has indicated that Title VII precedents are instructive in interpreting the Fair Housing Act. *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972). Together

with the ADEA, Title VII and the Fair Housing Act "are part of a coordinated scheme of federal civil rights law enacted to end discrimination." *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988). In light of the Title VII and ADEA precedents relevant here, the inescapable conclusion is that a rational basis is not sufficient to justify a facially discriminatory policy under the Fair Housing Act.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE SIXTH AND TENTH CIRCUITS REFUSING TO APPLY A RATIONAL BASIS TEST TO FACIALLY DISCRIMINATORY POLICIES UNDER THE FAIR HOUSING ACT

In the decision below, the Eighth Circuit imported into its Fair Housing Act analysis the rational relationship test from Equal Protection jurisprudence. The Court of Appeals for the Eighth Circuit recognized that the City of St. Louis' rule limiting group homes in single-family neighborhoods to eight "mentally or physically handicapped" persons plus two houseparents or guardians was disability-specific "on its face." App. A-4, A-77. However, rather than requiring defendant to establish one of the affirmative defenses defined by Congress in the Fair Housing Act, the court held that the applicable standard was whether the City had a "rational basis" for enacting the ordinance. App. A-4. Relying on the purposes traditionally proffered for single-family use restrictions, the court concluded that St. Louis' eight-plus-two rule had a rational basis and thus was valid under the Fair Housing Act.[1] App. A-4—A-5.

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[1] The rational basis test has been invoked in other Fair Housing Act cases involving explicitly disability-based policies. In *Hovson's Inc. v. Township of Brick*, No. 94-4265, slip op. at 13 (D. N.J. June 28, 1995), *rev'd on other grounds*, 89 F.3d 1096 (3d Cir. 1996), the district court dismissed an intentional discrimination challenge to a municipal zoning ordinance which

(Footnote 1 continued on next page)

In *Larkin*, the Sixth Circuit specifically declined to adopt the rational basis standard applied by the Eighth Circuit in the decision below. The *Larkin* case involved a Fair Housing Act challenge to a state zoning enabling statute which prohibited any licensed group home for individuals with disabilities from locating within 1500 feet of another such facility and required the municipality where the group home would be located to give notification to all residents whose property lines were within 1500 feet of the proposed facility. The Sixth Circuit found that the spacing and notice requirements were, by their very terms, facially discriminatory and therefore properly analyzed as a type of intentional discrimination. *Larkin*, 89 F.3d at 290. The Sixth Circuit had never explicitly determined the level of burden that a facially discriminatory policy imposes on a defendant under the Fair Housing Act. In the process of formulating its standard, the Sixth Circuit considered and rejected the "Eighth Circuit . . . rule that discriminatory statutes are subject to a rational basis scrutiny, i.e., they will be upheld if they are rationally related to a legitimate government objective." *Larkin*, 89 F.3d at 290. Instead, the Sixth Circuit settled on a standard which requires a defendant to show that its facially discriminatory policy is "'warranted by the unique and specific needs and abilities of those handicapped persons' to whom the regulations apply." *Id.*, quoting *Marbrunak, Inc. v. City of Stow, Ohio*, 974 F.2d 43, 47

(Footnote 1 continued)

excluded nursing homes from certain residential districts, finding that the ordinance was "rationally related to . . . legitimate governmental interests" and therefore "facially valid."

In *North Shore-Chicago Rehabilitation, Inc. v. Village of Skokie*, 827 F. Supp. 497, 500-01 (N.D. Ill. 1993), the court enjoined enforcement of a facially discriminatory ordinance requiring group homes for the handicapped to be occupied "on a permanent basis" and to have a state license. While it enjoined the ordinance, the court appeared to apply a hybrid standard which combined the constitutional rational basis test with the justification burden used in some disparate impact decisions.

(6th Cir. 1992). Like the Eighth Circuit, however, it did not require defendant to establish one of the Fair Housing Act's affirmative defenses.

The Tenth Circuit has articulated yet another standard for justifying facial discrimination under the Fair Housing Act. *Bangerter*, 46 F.3d at 1503. *Bangerter* involved state and local requirements for 24-hour supervision and establishment of a community advisory committee imposed on group homes for the handicapped. The Tenth Circuit recognized that these requirements facially singled out individuals with disabilites for differential treatment. In seeking to determine the appropriate standard for defendant's burden in cases of facial discrimination, the Tenth Circuit agreed that the constitutional rational basis test was not the proper standard under the Fair Housing Act.[2] "[T]he use of an Equal Protection analysis is misplaced here because

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[2] The Third Circuit affirmed without opinion a district court decision which similarly found the constitutional standard inappropriate under the Fair Housing Act. *Horizon House v. Township of Upper Southampton*, 804 F. Supp. 683 (E.D. Pa. 1992), *aff'd without opinion*, 995 F.2d 217 (3d Cir. 1993). Although the trial court determined that the defendant's spacing requirement did not meet even the minimal level of scrutiny, it nevertheless concluded that "the standard under the [Fair Housing Act] is a higher level of scrutiny than the rational basis test applied to an equal protection analysis." *Id.* at 695 n.6. The decisions of several other district courts are also in conflict with the Eighth Circuit's decision here. *Potomac Group Home v. Montgomery County, Maryland*, 823 F. Supp. 1285, 1295 n.8 (D. Md. 1993); *United States v. Schuylkill Township*, No. 90-2165, 1990 U.S. Dist. LEXIS 15555, at *18 n.10 (E.D. Pa. November 16, 1990). Although they rejected the rational basis standard used by the Eigth Circuit in this case, none of these courts articulated an alternative test.

Another district court, however, applied a standard different from those used by the Sixth, Eighth, and Tenth Circuits. In *Association for Advancement of the Mentally Handicapped, Inc. v. City of Elizabeth*, 876 F. Supp. 614, 620 (D. N.J. 1994) the court recognized that the state and local zoning laws at issue were facially discriminatory, but it chose to adopt the standard imposed on defendants in the Third Circuit's disparate impact cases.

this case involves a federal statute and not the Fourteenth Amendment." *Id.* at 1503. Even though individuals with disabilites are not a suspect class for constitutional purposes, the Fair Housing Act "specifically makes the handicapped a protected class for purposes of a statutory claim—they are the direct object of the statutory protection." *Id.* In the view of the Tenth Circuit, the Fair Housing Act affords individuals with disabilities a higher level of protection than a rational basis test can provide.

For its own standard, the Tenth Circuit looked in part to "the language of the [Fair Housing Act] itelf." *Id.* Section 3604(f)(9) provides that the prohibition against discrimination on the basis of handicap does not require "that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." 42 U.S.C. §3604(f)(9). Based on that statutory affirmative defense, the Tenth Circuit's standard permits the defendant to show that its discriminatory policy is justified by particular public safety concerns presented by the individual disabled residents at issue. *Id.* at 1503-04. In addition, the Tenth Circuit drew upon Title VII and Fair Housing Act precedents to allow special restrictions on the disabled if defendant can show that the restrictions confer a benefit in terms of housing opportunities for individuals with disabilities which clearly outweigh any burden they might impose. *Id.* at 1504. In the Tenth Circuit, then, defendant must establish that an explicitly disability-based policy is warranted either by "public safety" concerns or as "benign discrimination." *Id.* at 1503.

The conflict presented by these cases is clear and requires resolution by this Court.

CONCLUSION

For the foregoing reasons, petitioners request this Court to issue its writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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